No. 18-3329

In the United States Court of Appeals
FOR THE SIXTH CIRCUIT

PRETERM-CLEVELAND; PLANNED PARENTHOOD OF SOUTHWEST OHIO REGION; WOMEN'S MEDICAL PROFESSIONAL CORPORATION; DOCTOR ROSLYN KADE; PLANNED PARENTHOOD OF GREATER OHIO,
PLAINTIFFS-APPELLEES,

v.

LANCE HIMES, DIRECTOR, OHIO DEPARTMENT OF HEALTH; KIM G. ROTHERMEL, SECRETARY, STATE MEDICAL BOARD OF OHIO; BRUCE R. SAFERIN, SUPERVISING MEMBER, STATE MEDICAL BOARD OF OHIO,
DEFENDANTS-APPELLANTS,

and

JOSEPH T. DETERS, HAMILTON COUNTY PROSECUTOR; MICHAEL C. O'MALLEY, CUYAHOGA COUNTY PROSECUTOR; MATT HECK, JR., MONTGOMERY COUNTY PROSECUTOR; RON O'BRIEN, FRANKLIN COUNTY PROSECUTOR,
DEFENDANTS

On Appeal From The United States District Court
For The Southern District Of Ohio
Case No. 18-cv-109
The Honorable Timothy S. Black, Judge

BRIEF OF THE STATES OF WISCONSIN, ALABAMA, ARKANSAS, GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND WEST VIRGINIA, AND THE ATTORNEY GENERAL OF MICHIGAN AS *AMICI CURIAE* SUPPORTING DEFENDANTS-APPELLANTS AND REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Rules

Other Authorities

IDENTITY AND INTEREST OF *AMICI CURIAE*

The *amici curiae* are the States of Wisconsin, Alabama, Arkansas, Georgia, Idaho, Indiana, Kansas, Louisiana, Nebraska, Oklahoma, South Carolina, South Dakota, Texas, Utah, and West Virginia, and the Attorney General of Michigan ("the States"), who file this brief under Federal Rule of Appellate Procedure 29(a). The States have a sovereign right to prohibit the discriminatory elimination of classes of human beings. The district court's preliminary injunction blocking Ohio House Bill 214 (hereinafter "H.B. 214," "Ohio's Antidiscrimination Law," or "the Law"), which bans the performing of abortions sought because of an unborn child's Down syndrome diagnosis or potential diagnosis, threatens the States' ability to enforce substantially similar laws their state legislatures have already enacted or may enact in the future. *See* H.B. 214, 132nd Gen. Assemb. (Ohio 2017); Ohio Rev. Code § 2919.10(B) (codification of H.B. 214); N.D. Cent. Code § 14-02.1-04.1; Ind. Code § 16-34-4-6; La. Stat. § 40:1061.1.2.

INTRODUCTION

Ohio sought to address an invidiously discriminatory practice that violates one of this Nation's foundational principles: the elimination of a class of human beings for discriminatory reasons. Plaintiffs do not dispute that this practice persists in Ohio and elsewhere; to the contrary, in their view, carrying out such an invidiously discriminatory practice is "the right decision." R.1, PageID#3. Ohio is not alone in addressing this evil. *See, e.g.*, Ohio Rev. Code § 2919.10(B); N.D. Cent. Code § 14-02.1-04.1; Ind. Code § 16-34-4-6; La. Stat. § 40:1061.1.2. Contrary to the district

court's erroneous conclusion, the Supreme Court has not decided the constitutionality of such a law. Although the plaintiffs in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), "sought declaratory and injunctive relief against a wide array of [Pennsylvania's] 1988 and 1989" abortion regulations, they did not seek to block Pennsylvania's related antidiscrimination law enacted during the same period, one that prohibited gender-discriminatory abortions. *See* Brief for Respondents, *Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006423, at *4. Indeed, after a panel of the Seventh Circuit—the only Circuit in the country to have addressed this type of law—invalidated Indiana's similar ban on discriminatory abortions, Judge Easterbrook wrote to explain that "*Casey* did not consider the validity of an anti-eugenics law," and "[n]one of the [Supreme] Court's abortion decisions holds that states are powerless to prevent abortions designed to choose the . . . [disability] attributes of children." Order at 5, *Planned Parenthood of Ind. v. Comm'r of Ind. State Dep't of Health*, No. 17-3163 (7th Cir. June 25, 2018), ECF No. 57 (Easterbrook, J., dissenting from denial of rehearing en banc).

The district court here invalidated Ohio's Antidiscrimination Law without giving any meaningful consideration to one of the most compelling interests that the State sought to advance: prohibiting the discriminatory elimination of a class of people. The district court blithely disregarded that interest, which it found "especially not well-taken," in a single short paragraph. R.28, PageID#591.

The district court gave this powerful sovereign interest such short shrift because it erroneously believed that the Supreme Court had created a "categorical"

or "unfettered" right to pre-viability abortion, R.28, PageID#587–89, such that the State's proffered interests were irrelevant. But as the Supreme Court has made clear, even when addressing foundational rights such as the freedom of speech and the freedom from state-sponsored racial classification, the Constitution does not enshrine "categorical" rights. "[E]ven the fundamental rights of the Bill of Rights are not absolute," *Kovacs v. Cooper*, 336 U.S. 77, 85 (1949), and there is no basis for elevating the unenumerated right to pre-viability abortion above those rights. Indeed, *Casey* recognized at least one state interest that justified prohibiting some pre-viability abortions—the interest in protecting pregnant minors when an abortion would not be in the minor's best interests and her parents do not consent—and there is every reason to conclude that the State's overriding interest in prohibiting the elimination of a class of human beings for discriminatory reasons is a similarly powerful interest. And given the recent, vivid demonstrations of the pernicious impacts of such discriminatory abortions both in this country and around the world, the interest sought here is particularly critical.

ARGUMENT

I. Ohio's Antidiscrimination Law Is Constitutional

Ohio's Antidiscrimination Law prohibits doctors from performing abortions sought for certain discriminatory reasons; that is, based upon the unborn child's Down syndrome diagnosis. *See* H.B. 214, § 1.* In preliminarily enjoining this Law,

* H.B. 214 bans the performance of discriminatory abortions based on a Down syndrome diagnosis at any gestational age. *See* H.B. 214, § 1. Plaintiffs challenged the law

the district court held that pre-viability abortion is a "categorical" or "unfettered" right under Supreme Court caselaw, meaning that the State's justifications for the law are irrelevant. R.28, PageID#587–89. The district court misunderstood the Supreme Court's abortion jurisprudence and, in so doing, gave no weight to Ohio's compelling interest in preventing the elimination of the class of human beings with a Down syndrome diagnosis. *See* Br. of Defendants-Appellants 36–48.

A. Contrary To The District Court's Conclusion, The Supreme Court Has Not Held, "Expressly" Or Otherwise, That Pre-Viability Abortion Is A "Categorical" or "Unfettered" Right

The district court rejected Ohio's Antidiscrimination Law based upon a misreading of the Supreme Court's abortion caselaw. *See* Br. of Defendants-Appellants 36. The district court believed that the Court has "expressly and unambiguously [held] that women have an unfettered constitutional right, pre-viability, to choose whether to terminate or to continue their pregnancy," R.28, PageID#586, such that a State can never prohibit any woman from obtaining a pre-viability abortion, no matter how powerful its interests or how carefully tailored its law to achieving that interest. As the district court phrased it, in its view, "a woman's right to decide whether or not to terminate her pregnancy pre-viability" must be "free from *any* governmental involvement." R.28, PageID#578. With this incorrect premise as the starting point for its analysis, the district court invalidated Ohio's Antidiscrimination Law without even considering the State's proffered interests. The

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on the grounds that it impermissibly infringed "previability abortions," R.1, PageID#13, yet the district court's preliminary injunction blocks the entire law, not just its application to such pre-viability abortions, R.28, PageID#596.

district court misinterpreted Supreme Court precedent, ascribing to the Court an extreme rule that would enshrine pre-viability abortion as an *absolute* right, a status the Court has not afforded *any* rights, including rights as core to our constitutional order as free speech or freedom from state-sponsored racial classification. *See* Br. of Defendants-Appellants 44–48.

The Supreme Court has adopted a flexible, sliding-scale approach to evaluating the constitutionality of abortion regulations. *See* Br. of Defendants-Appellants 41–42. In the years following *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court had subjected laws that interfered with abortion rights to "strict scrutiny." *Casey*, 505 U.S. at 875–78 (plurality op.); *see, e.g.*, *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 427, 434 (1983). Replacing *Roe*'s strict-scrutiny framework, the Supreme Court in *Casey* adopted an "undue burden" approach, requiring a sliding-scale level of inquiry—ranging from rigorous to permissive—depending upon the level of interference with a woman's abortion rights. *See Gonzales v. Carhart*, 550 U.S. 124, 146 (2007); Br. of Defendants-Appellants 41. Put another way, "*Casey*'s undue-burden test [is a] right-specific test on the spectrum between rational-basis and strict-scrutiny review." *Whole Women's Health v. Hellerstadt*, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting).

The district court was thus wrong to conclude that *Casey* and its progeny preemptively rejected the legality of every possible prohibition against any pre-viability abortion, no matter how powerful the State's interest involved. *See* R.28, PageID#578, 588–91; Br. of Defendants-Appellants 44. The district court, for

example, quoted the Supreme Court's statement from *Casey* that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." R.28, PageID#580 (quoting *Casey*, 505 U.S. at 879 (plurality op.)). But this and similar passages from the Supreme Court were addressing only "the State's interests" *actually urged* before the Supreme Court, such as the State's general interest in unborn life and the health of the mother. *See Casey*, 505 U.S. at 846 (plurality op.); *Whole Women's Health*, 136 S. Ct. at 2310. As Judge Easterbrook, joined by three other Seventh Circuit Judges, explained when considering the import of this exact passage from *Casey* to a similar Indiana law, "[j]udicial opinions are not statutes; they resolve only the situations presented for decision." Order at 5, *Planned Parenthood of Ind.*, No. 17-3163 (7th Cir. June 25, 2018), ECF No. 57 (Easterbrook, J., dissenting from denial of rehearing en banc). "*Casey* did not consider the validity of an anti-eugenics law," so it is wrong to understand it as holding that pre-viability abortion is such an absolute right that *every* conceivable state interest must always yield to that right—*including interests that the State did not advance in* Casey *or any other case that the Supreme Court has faced*. *Id.* Indeed, *Casey* itself held that the State could prohibit a minor from obtaining an abortion where her parents did not consent and a court found both that the abortion was not in the minor's best interests and that the minor was not "mature and capable of giving informed consent." *Casey*, 505 U.S. at 899 (plurality op.). Just as the State's "strong and legitimate interest in the welfare of its young citizens," *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990), is sufficiently powerful to permit States to prohibit at least some pre-viability abortions,

other state interests might also be compelling enough to justify the prohibition of some other pre-viability abortions.

More generally, the district court's "categorical" or "unfettered" understanding of pre-viability abortion rights wrongly assumes that the Supreme Court adopted the unthinkable view that pre-viability abortion has a greater constitutional status than core rights like the freedom of speech or the freedom from state-sponsored racial classification. As the Supreme Court has explained, "even the fundamental rights of the Bill of Rights are not absolute." *Kovacs*, 336 U.S. at 85. For example, the First Amendment provides in categorical terms that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press." U.S. Const. amend. I. Yet, as the Supreme Court has explained, "[t]he protections afforded by the First Amendment . . . are not absolute." *Virginia v. Black*, 538 U.S. 343, 358 (2003). The Court has, for example, recognized "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942), while holding that the States can prohibit even fully protected speech where the law satisfies strict scrutiny, *see, e.g.*, *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1665–66 (2015). And moving beyond the Bill of Rights, the Fourteenth Amendment's Equal Protection Clause provides, without qualification, that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Yet the Supreme Court has explained that a State may even

use racial classifications where it satisfies strict scrutiny; for example, to prevent prison riots, *see Johnson v. California*, 543 U.S. 499, 512–14 (2005), or to comply with the Voting Rights Act, *see Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 800–02 (2017).

Judge Manion, writing separately in the Seventh Circuit's panel decision in *Planned Parenthood of Indiana*, recognized the absurdities that result from holding pre-viability abortions a "categorical" right, although he erroneously believed *Casey* mandated such absurdities. *Planned Parenthood of Ind. & Ky. v. Comm'r, Ind. State Dep't of Health*, 888 F.3d 300, 310–21 (7th Cir. 2018) (Manion, J., concurring in the judgment in part and dissenting in part). Judge Manion explained that raising pre-viability abortion to the status of an unassailable right requires courts to narrow their review of abortion regulations to the burdens they impose, without considering the gravity of the State's interest furthered by such regulations. *See id.* at 312–14. This "pure effects test" denies the States any opportunity to defend such regulations by asserting their own interests, no matter how compelling. *See id.* at 312, 314–15. This raises the right to a pre-viability abortion above all other guarantees found in the constitutional constellation—including those expressly enumerated in the Bill of Rights. *See id.* at 312.

In all, even if one were to view pre-viability abortion as a right on par with free speech or equal protection—a doubtful proposition in light of the fact that freedom of speech and equal protection are enumerated rights, core to our constitutional order—"[n]o fundamental right . . . is absolute." *McDonald v. City of Chicago*, 130 S. Ct.

3020, 3056 (2010) (Scalia, J., concurring); Br. of Defendants-Appellants 44–48. And because "[n]o right is absolute," "the strength of the individual's liberty interests and the State's regulatory interests must *always* be assessed and compared." *McDonald*, 130 S. Ct. at 3101 (Stevens, J., dissenting) (emphasis added); *accord* Order at 5, *Planned Parenthood of Ind.*, No. 17-3163 (7th Cir. June 25, 2018), ECF No. 57 (Easterbrook, J., dissenting from denial of rehearing en banc) ("None of the Court's abortion decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children."). The district court was thus wrong to reject Ohio's Antidiscrimination Law without considering the State's proffered interests under *Casey*'s sliding-scale, undue-burden approach.

B. States Can Constitutionally Enact Abortion Laws That Prohibit The Discriminatory Elimination Of A Class Of Human Beings

Plaintiffs are attacking an abortion law of a type that the Supreme Court has never considered, based upon a state interest the Court has never confronted: a prohibition on doctors performing abortions sought for a discriminatory purpose, where the State's interest is preventing the elimination of a class of human beings with a disability. As explained below, antidiscrimination abortion laws like Ohio's are lawful under the Supreme Court's sliding-scale, undue-burden test because they advance the compelling state interest of stopping the discriminatory elimination of a class of human beings. Indeed, the State's interests at issue here are so overriding that such laws would survive review regardless of what level of scrutiny this Court applied within the *Casey* sliding-scale continuum. And because the strength of the State's interest in stopping the discriminatory elimination of a class of human beings

is not tied in any way to the unborn child's stage of development, the fact that such laws typically apply both pre- and post-viability does not change the analysis or bottom-line conclusion.

The prevalence of abortions that eliminate "undesirable" classes of human beings in the United States—and in particular those diagnosed with Down syndrome—presents a grave social problem that States have a compelling interest in stopping. As Dr. Dennis Sullivan explained in this case, 61 to 91 percent of pregnant women in the United States who are informed that their child will be born with Down syndrome eliminate that child by abortion. R.25-1, PageID#149–50; *see also* Caroline Mansfield et al., *European Concerted Action, Termination Rates After Prenatal Diagnosis of Down Syndrome, Spina Bifida, Anencephaly, and Turner and Klinefelter Syndromes: A Systematic Literature Review*, 19 Prenatal Diagnosis 808, 810 (1999) (estimating that this figure is closer to 90 percent); R.25-2, PageID#382 (reproduction of Julian Quinones & Arijeta Lajka, *"What Kind of Society Do You Want to Live In?": Inside the Country Where Down Syndrome is Disappearing*, CBS News (Aug. 14, 2017), https://goo.gl/o6W1er (all URLs in this Brief were last visited June 28, 2018) (estimating figure at 67 percent)). This extremely high termination rate has reduced the Down syndrome community by 30 percent. R.25-1, PageID#149–50.

This practice is partly due, no doubt, to doctors advocating for the abortion of unborn children with Down syndrome. Br. of Defendants-Appellants 18–25; *see, e.g.*, Hannah Korkow-Moradi et al., *Common Factors Contributing to the Adjustment Process of Mothers of Children Diagnosed with Down Syndrome: A Qualitative Study*,

28 J. Fam. Psychotherapy 193, 197 (2017). Doctors have publicly urged, for example, for the "eradication of [ ] disorder[s]" like Down syndrome via "widespread acceptance of selective termination" of unborn children with the condition. David A. Savitz, *How Far Can Prenatal Screening Go in Preventing Birth Defects*, 152 J. of Pediatrics 3, 3 (Jan. 2008), https://goo.gl/rmCBwE (also calling this "a desirable and attainable goal"). And parents of children with Down syndrome, including mothers of unborn children, often experience negative attitudes from medical professionals firsthand. Br. of Defendants-Appellants 20–25 (detailing extensive studies of such parental experiences, both in the United States and abroad). These experiences include doctors pressuring mothers to abort their unborn children upon receiving a Down syndrome diagnosis. Br. of Defendants-Appellants 21–25 (citing, among other studies, Briana S. Nelson Goff et al., *Receiving the Initial Down Syndrome Diagnosis: A Comparison of Prenatal and Postnatal Parent Group Experiences*, 51 Intellectual & Developmental Disabilities 446, 455 (2013), reproduced at R.25-2, PageID#438).

Plaintiffs do not deny that these practices persist in the United States, but affirmatively and emphatically want to assist in this form of discrimination. In Plaintiffs' view, the license to target unborn children for elimination because of their Down syndrome diagnosis is part of Plaintiffs' "mission to honor and support the decisions their patients make." R.1, PageID#3. Plaintiffs even admit that they know that at least some of "their patients seek abortions based solely or in part on a prenatal diagnosis of Down syndrome." R.1, PageID#8–9; *accord* R.3-1, PageID#38–39 (declaration of one of Plaintiffs' doctors).

Remarkably, in defending their plain intent to eliminate members of the Down syndrome community via discriminatory abortion, Plaintiffs criticized the *supporters* of H.B. 214 for *their* lack of compassion towards those with Down syndrome, since this law by itself "does not allocate any state resources" for those with Down syndrome or "protect individuals with Down syndrome from [other types of] discrimination." R.3, PageID#18. Yet consider the record in this case. The sponsor of H.B. 214 stated that, "[r]egardless of which corner of [Ohio] you live, there is an organization dedicated to improving the lives of people with Down syndrome and their families." R.25-1, PageID#190 (testimony of Assistant Majority Floor Leader Sarah LaTourette). The executive director of such an organization, who himself has a child with Down syndrome, testified in support of the law, R.25-2, PageID#418, as did other individuals affected by Down syndrome, *e.g.*, R.25-2, PageID#422. Further, Ohio offers both "financial and emotional [support]" for "parents of children with Down syndrome," R.25-1, PageID#177, and the Americans with Disabilities Act and Ohio law prohibit discrimination against these individuals in many aspects of life, 42 U.S.C. § 12132; Ohio Rev. Code § 3781.111, as does the Constitution, *see City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

The dire consequences of similar discriminatory abortion practices in other countries underscore the compelling state interest in stopping these practices from spreading in the United States. *See* Br. of Defendants-Appellants 13–16, 19 (detailing evidence from the Netherlands, Iceland, Canada, France, and the United Kingdom). Iceland is a canary in the coal mine of the consequences of abortion

practices that eliminate supposedly "undesirable" classes of human beings. As has been recently reported, "the vast majority of women [in Iceland]—close to 100 percent—who receive[ ] a positive test for Down syndrome terminate[ ] their pregnancy." Quinones & Lajka, *supra*. Nor is Iceland alone, as the "estimated termination rate" of unborn children with Down syndrome is 98 percent in Denmark. *Id.*

The grave consequences of other forms of discriminatory abortion practices are also well documented. Some experts have concluded that there are 100 to 160 *million* "missing" women in Asia. *See* Mara Hvistendahl, Unnatural Selection: Choosing Boys over Girls, and the Consequences of a World Full of Men 5–12 (2011). In India, for example, "[o]ver the course of several decades, 300,000 to 700,000 female fetuses were selectively aborted [ ] each year." Sital Kalantry, *How to Fix India's Sex-Selection Problem*, N.Y. Times (Jul. 27, 2017), https://goo.gl/Xe2JqE; *accord* Nicholas Eberstadt, *The Global War Against Baby Girls*, The New Atlantis (2011), https://goo.gl/g3CXYC (documenting similar phenomenon in China, South Korea, and other countries); *see also* Mara Hvistendahl, *Where Have All the Girls Gone?*, Foreign Policy (June 27, 2011), https://goo.gl/qNBPce ("[F]eminists in Asia worry that as women become scarce, they will be pressured into taking on domestic roles and becoming housewives and mothers rather than scientists and entrepreneurs[.]"). And sex-selective abortions are common in some communities in the United States. *See* Douglas Almond & Lena Edlund, *Son-Biased Sex Ratios in the 2000 United States Census*, 105 Proc. of the Nat'l Acad. of Sci. 5861, 5861 (2008), https://goo.gl/69SJX9;

Jason Abrevaya, *Are There Missing Girls in the United States? Evidence from Birth Data*, 1 Am. Econ. J.: Applied Econ. 1–34 (2009), https://goo.gl/MaqGxP. Such favoring "is a symptom of pervasive social, cultural, political and economic injustices against women, and a manifest violation of women's human rights." *Sex Imbalances at Birth: Current Trends, Consequences, and Policy Implications*, U.N. Population Fund Asia & Pacific Regional Office (Aug. 2012), https://goo.gl/8eP2XD; *Gender-Biased Sex Selection*, U.N. Population Fund, https://goo.gl/KhqUb2 ("Son preference is an expression of the low value that girls are afforded in some communities.").

The States' compelling interest in stopping such discriminatory practices from continuing and spreading follows necessarily from the logic underlying this country's legal protections against private discrimination. *Accord* Order at 5, *Planned Parenthood of Ind*, No. 17-3163 (7th Cir. June 25, 2018), ECF No. 57 (Easterbrook, J., dissenting from denial of rehearing en banc) (comparing prohibition on discriminatory abortions to prohibition on discriminatory firings). Most relevant, for example, both Congress and the States have forbidden discrimination against disabled individuals in employment and other areas, including by enacting laws such as the Americans With Disabilities Act, 42 U.S.C. § 12132, and the Rehabilitation Act of 1973, 29 U.S.C. § 794. *See* Wis. Stat. § 111.321; *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 284 (1987). Further, the Supreme Court has held that States have a "compelling interest in eliminating discrimination against women" in club admissions, even where the laws conflict with First Amendment associational values. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987);

Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984); *see, e.g.*, Wis. Stat. § 106.52. And both Congress and the States prohibit the "moral and social wrong" of discrimination by private parties in public accommodations, *see Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964); *see, e.g.*, Wis. Stat. § 106.52, and in other areas, *see Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983). Given that stopping private discrimination based upon disability, gender, or race—in areas as diverse as public accommodations, employment, and organization membership—is a "compelling" state interest, *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 n.5 (1988), it follows that the state interest in stopping the *elimination* of classes of people with these same characteristics is even *more* compelling. Surely a State that has the authority to protect members of the Down syndrome community from being discriminated against in employment or public accommodations may protect that same community from wholesale elimination.

Advancing these nondiscrimination interests also sends a powerful signal to members of the Down syndrome community that it is "inhumane" to terminate them, thereby affirming the "profound respect" that the State holds for all people, while protecting society as a whole from trends that "further coarsen [it] to the humanity of not only newborns, but all . . . human life." *See Gonzales*, 550 U.S. at 157 (citation omitted). As Frank Stephens, a disability-rights activist who himself has Down syndrome, powerfully testified, "a notion is being sold that maybe we don't need to continue to do research concerning Down syndrome. Why? Because there are pre-natal screens that will identify Down syndrome in the womb, and we can just

terminate those pregnancies." R.25-1, PageID#144 (reproduction of Frank Stephens, Testimony Before House Subcommittee on Labor, Health and Human Services, and Education 1 (Oct. 25, 2017), https://goo.gl/9WsqPf). Recent efforts to "eliminate" Down syndrome are nothing more than "people pushing [a] particular 'final solution' [ ] that people [with Down syndrome] should not exist. They are saying that [people with Down syndrome] have too little value to exist." *Id.* By enacting laws like Ohio's Antidiscrimination Law, the States affirm Mr. Stephens' poignant claim that those like him are equal human beings. *Id.* These laws thus advance the vital cause of demonstrating to society that *all* human beings—including those with disabilities—have lives "worth living."

Mr. Stephens' insights and concerns are shared by other members of the Down syndrome community. The President of the Global Down Syndrome Foundation has explained that, among other challenges members of the Down syndrome community face, they suffer from "a precipitous drop in research funding over the years," which has made Down syndrome "the most poorly funded major genetic condition in the United States." Ariana Eunjung Cha, *Babies with Down Syndrome Are Put on Center Stage in the U.S. Abortion Fight*, Wash. Post (Mar. 5, 2018), https://goo.gl/ei38ES. Because increased "financial support for families of children with Down syndrome" is linked to "lower termination rates," such a drop could cause higher termination rates of unborn children diagnosed with the condition. *See* Jaime L. Natoli et al., *Prenatal Diagnosis of Down Syndrome: A Systematic Review of Termination Rates (1995–2011)*, 2012 Prenatal Diagnosis 32, 151 (2012), https://goo.gl/mbnjkq; *accord* Holly

Christensen, *The Problem with the Down Syndrome Abortion Ban*, Akron Beacon J. (Dec. 28, 2017), https://goo.gl/TSqjJ1. Indeed, this lack of support is particularly concerning given the many historical quality-of-life improvements enjoyed by members of this community. "The life expectancy of a person diagnosed with Down syndrome has increased dramatically over the last several decades–from just 25 in 1983 to 60+ today." R.25-1, PageID#190. Today, "thanks to medical advances and better integration into society, many individuals with Down syndrome live long, productive and happy lives," including "living independently, going to college, holding challenging jobs, and getting married." Cha, *supra*. The medical community is vital to continuing this success, as medical professionals "play a major role during counseling and can have a significant impact on parents' decisions" to carry their children with Down syndrome to term. Rachèl V. van Schendel et al., *What Do Parents of Children with Down Syndrome Think about Non-Invasive Prenatal Testing (NIPT)?*, 26 J. of Genetic Counseling 3, p. 528 (2017), https://goo.gl/msj2cd; *accord* Br. of Defendants-Appellants 53 (justifying the Law with Ohio's interests in safeguarding the integrity of the medical profession); *compare supra* p. 10–11.

Finally, that Ohio's Antidiscrimination Law applies pre-viability in no way renders it unconstitutional because the State's nondiscrimination interests are not linked to the stage of the unborn child's development. In the traditional abortion-regulation context, the Supreme Court has held that the State's interest in protecting an unborn child's life is "not strong enough" to prohibit a pre-viability abortion. *See Casey*, 505 U.S. at 846, 860 (plurality op.). The logic in those cases is that the more

developed the unborn child, the stronger the State's interest in keeping that child alive. *Id.* Contrary to the district court's conclusion, R.28, PageID#591, that reasoning has no applicability to the non-discrimination interests at issue in this case. The social problem that laws like Ohio's Antidiscrimination Law address is the discriminatory elimination of a class of human beings. It makes no difference from the point of view of that antidiscrimination interest—including the beliefs of those in the Down syndrome community that the State should affirm through law that their lives are "worth living"—if unborn children with Down syndrome are systematically eliminated at 10 weeks or 25 weeks or after they are born. Indeed, confining antidiscrimination laws to only post-viability would thwart the attainment of these compelling interests because genetic screening for purposes of eliminating those with disabilities now regularly takes place well before viability, including "as early as 10 weeks into the pregnancy." *See* Nat'l Down Syndrome Soc'y, *Understanding a Diagnosis of Down Syndrome*, https://goo.gl/kb4Be5; *accord* van Schendel, *supra*, at 525.

CONCLUSION

This Court should reverse the preliminary injunction.

Dated: June 29, 2018

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 4,718 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using the 2013 version of Microsoft Word in 12-point Century Schoolbook font.

Dated: June 29, 2018

/s/ Misha Tseytlin
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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June, 2018, I filed the foregoing Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: June 29, 2018

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